

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

INDEPENDENCE RESIDENCES, INC.

and

Case No. 29-CA-30566

WORKERS UNITED, SERVICE EMPLOYEES
INTERNATIONAL UNION

Emily Cabrera, Esq., Brooklyn, NY, for the
General Counsel.

Louis P. DiLorenzo, Esq., (Bond Schoeneck & King PLLC),
New York, NY, for the Respondent.

Ira Katz, Esq., New York, NY, for the Charging Party.

DECISION

Steven Fish, Administrative Law Judge: Pursuant to charges filed by Workers United, Service Employees International Union (Workers United) in Case Nos. 29-CA-26042 and 29-CA-30566, the Director for Region 29 issued a complaint and notice of hearing on February 28, 2011, alleging that Independence Residences, Inc. (Respondent or the Employer) violated Section 8(a)(1) and (5) of the Act by refusing to recognize and bargain with Workers United, alleged to be the successor labor organization to UNITE, AFL-CIO, CLC (UNITE), which union had been certified to represent Respondent's employees, by refusing to supply relevant information to Workers United and by making several changes in conditions of employment of its employees without notifying or bargaining with UNITE.

On March 29, 2011, Respondent filed a Motion to Dismiss the complaint allegations relating to the charge filed in Case No. 29-CA-26042, which was filed on December 30, 2003, on the grounds of laches. Thereafter, on April 26, 2011, General Counsel filed an Opposition to Respondent's Motion to Dismiss. On May 19, 2011, the Board issued an Order denying Respondent's Motion to Dismiss the complaint allegations relating to Case No. 29-CA-26042.

The trial, respect to the instant complaint, was held before me on May 23, 2011 in Brooklyn, New York. At the start of the hearing, General Counsel moved to sever Case No. 29-CA-26042 from the complaint and to withdraw allegations 17-25 from the complaint based on a "conditional settlement" reached by the parties. I granted General Counsel's motion, which left the complaint allegations relating to Case No. 29-CA-30566 for disposition.

Briefs have been filed by the parties and have been carefully considered. Based upon the entire record,¹ including my observation of the demeanor of the witnesses, I, hereby, issue

¹ Pursuant to agreement of all parties, the record was left open for the submission of Respondent's Exhibit 7 and Charging Party's Exhibit 3. These documents were submitted

the following recommended:

Findings of Fact

5 I. Jurisdiction and Labor Organization

Respondent is a corporation with its principal place of business located at 93-22 Jamaica Avenue in Woodhaven, New York and 13 residential facilities located throughout Kings, Queens and Bronx Counties in New York City, where it has been engaged in training, housing and related activities for developmentally disabled adults.

During the past 12 months, which period is representative of its operations in general, Respondent derived gross revenues in excess of \$250,000 and purchased and received at its New York state facilities supplies and materials valued in excess of \$10,000 directly from points located outside the state of New York.

It is admitted, and I so find, that at all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

It is also admitted, and I so find, that UNITE and Workers United are and have been labor organizations within the meaning of Section 2(5) of the Act.

II. Prior Related Case

Independence Residences, Inc., 355 NLRB #153 (2010), Case No. 29-RC-10030

On April 24, 2004, Union of Needletrades Industrial and Textile Employees (UNITE), AFL-CIO (UNITE or Petitioner) filed a petition seeking to represent certain employees employed by Respondent. On May 9, 2003, the Director for Region 29 approved a Stipulated Election Agreement executed by the parties, providing for an election to be conducted among employees in the following unit:

All full-time and regular part-time and Relief employees in the classifications of Direct Care Workers, Residential Habilitation Specialists, Day Habilitation Workers, Medical Care Workers and Maintenance, employed by the Employer at and out of its office located at 93-22 Jamaica Avenue, Woodhaven, New York, and its facilities listed in Appendix A,² excluding all office clerical and administrative employees, technical employees, professional and managerial employees, guards and supervisors as defined in Section 2(11) of the Act.

²They are as follows:

PARK LANE SOUTH RESIDENCE
101-08 Park Lane South
Richmond Hill, New York 11418

subsequent to the close of the hearing and are received in evidence.

METROPOLITAN TOWERS RESIDENCE

119-40 Metropolitan Avenue – Apt. #C1
Kew Gardens, New York 11415

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JUDITA M. PRELOG RESIDENCE

130-33 130th Street
South Ozone Park, New York 11420

10

DR. BETTY BIRD RESIDENCE

93-31 85th Road
Woodhaven, New York 11421

15

101ST AVENUE RESIDENCE

103-12 101st Avenue
Ozone Park, New York 11417

20

EAST 21ST STREET RESIDENCE

804 East 21st Street
Brooklyn, NY 1210

25

FLORENECE KALIL GUTMAN RESIDENCE/SUNNYSIDE

50-28 39th Place
Sunnyside, New York 11104

30

METROPOLITAN TOWERS RESIDENCE 1L

119-40 Metropolitan Avenue – Apt. #C3
Kew Gardens, New York 11415

JACKSON HEIGHTS RESIDENCE/WOODSIDE 69TH

33-23 69th Street
Woodside, New York 11377

35

FOREST HILLS RESIDENCE

108-14 Metropolitan Avenue – Apt. #2L
Forest Hills, New York 11415

40

77TH STREET RESIDENCE

90-10 77th Street
Woodhaven, New York 11421-2805

Subsequently, a mail ballot election was conducted between June 2 and June 16, 2003. The tally of ballots issued on June 17, 2003 shows 68 votes for and 32 against the Petitioner, with 7 challenged ballots, an insufficient number to affect the results.

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Thereafter, on June 24, 2003, Respondent filed timely objections to conduct affecting the conduct of the election.

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On August 4, 2003, the Director issued a Report on Objections and Notice of Hearing, in which he directed a hearing on certain of the Employer's objections and recommended that one objection be overruled.

UNITE also filed unfair labor practice charges in Case No. 29-CA-25657, 25697 and

25720 on various dates between June 13 and July 17, 2003, alleging that Respondent violated various sections of the Act.

On September 30, 2003, the Director issued an Order Consolidating Cases, Consolidated Complaint, Report on Objections and Notice of Hearing, in which he consolidated the representation case with the unfair labor practice charges alleged in said complaint, which alleged that Respondent violated Sections 8(a)(1) and (3) of the Act in various respects.

The trial with respect to the issues raised by the pleadings was held before me over the course of nine days between November 18 and December 12, 2003. At the close of the trial, I severed the representation and unfair labor practices cases in order to expedite the processing of the representation matter.

On June 7, 2004, I issued a Recommended Decision on Objections in Case No. 29-RC-10030. The employer's objections centered on its assertion that Section 211-a of New York Labor Law, which was in effect at the time of the election, was pre-empted by federal labor law and that its existence at the time warranted setting aside the election.

I recommended overruling the Employer's objections. I assumed, without deciding, that the New York labor law in question was pre-empted and found, however, that the Employer had not established that its campaign was substantially inhibited by the existence of the law. Rather, I concluded that the Employer conducted a vigorous and aggressive anti-union campaign, notwithstanding the alleged constraints of the New York labor law, and that the Employer had not met its burden of proving that the law had an objectionable impact on the free choice of employees in the election.

On September 30, 2004, I issued a decision on the unfair labor practices that were litigated at the same time as the representation case, but then were severed by me at the hearing. I found that Respondent violated Section 8(a)(1) of the Act by coercively interrogating employees about union activities, soliciting grievances with an implied promise to remedy them, threatening to end its focus group program if employees chose union representation and granting and timing the implementation of wage increases to influence employees' support for the Petitioner. I also found that Respondent violated Section 8(a)(1) and (3) of the Act by eliminating the regular part-time position of and reducing the hours of employee Mary Lynch because of her union activities and support.

Further, I recommended dismissal of complaint allegations that asserted that Respondent violated Section 8(a)(1) and (3) of the Act by terminating the employment of three other employees.²

No exceptions were filed to my Recommended Decision by any party. Consequently, the Board adopted the decision in an unpublished order on December 16, 2004.

Respondent did file exceptions in the representation case. The Board issued its decision on August 27, 2010 (355 NLRB #153), wherein it affirmed my decision and certified UNITE as the collective bargaining representative of Respondent's employees in the stipulated unit.

Member Schaumer and Hayes dissented, relying on the Supreme Court's decision *Chamber of Commerce v. Brown*, 554 U.S. 60 (2008), wherein a similar California statute was

² *Independence Residences*, JD(NY)-43-04 (Sept. 30, 2004).

held to be pre-empted by federal law. Chairman Liebman issued a concurring opinion noting that the case has languished at the Board for over seven years—an unconscionably long time—as a *still* unresolved challenge to New York State Labor Law Section 211-a has worked its way through the federal judicial system.” Id at p. 17.³

Chairman Liebman also relied on the unfair labor practices committed by Respondent to support her conclusion that the election should not be set aside. She observed as follows:

Here, the Employer insists that it was chilled by New York’s law from conducting the anti-union campaign it wanted to mount. But the Employer was *not* chilled by the National Labor Relations Act. It committed unfair labor practices during the election period, trying to coerce employees. On factual grounds, then, it is hard to credit and endorse the Employer’s claim—even apart from the unfairness of setting aside an election at the urging of a party that itself tried to destroy employee free choice.

The Board’s proper focus is on the voters in this election case: employees. Nothing in the evidence persuades me that the New York law prevented employees from freely choosing whether or not they wished union representation. They knew just where the Employer stood—so opposed to the Union that it was willing to violated federal law—and voted two to one for the Union even so. Viewed pragmatically, and with the basic goals of federal labor law in mind, the resolution of this case is simple.

Id at 17.

III. UNITE

UNITE was created in 1995 by the merger of the International Ladies Garment Workers’ Union (ILGWU) and the Amalgamated Clothing and Textile Workers’ Union. UNITE’s constitution defines the international union’s jurisdiction. It states as follows:

Section 4 Jurisdiction

The jurisdiction of UNITE includes all workers employed in the countries of North America and the Caribbean Basin by firms engaged in the production and distribution of textiles, clothing, apparel and related products; by commercial laundries, distribution centers and retail stores; and workers in other trades, occupations and industries.

UNITE’s members were organized into various local unions, which in turn, were, for the most part, affiliated with joint boards. The joint boards consisted of various local unions

³ What Chairman Liebman was referring to was that notwithstanding the Supreme Court’s decision in *Brown*, which was issued in 2008, the Federal Court litigation attacking the New York statute, which is similar to, but not identical to the California statute considered in *Brown*, was still not decided. *Healthcare Assn. of New York State v. Pataki*, 388 F.Supp.2d 6 (N.D. New York)(Pataki I); 471 F.3d 87 (2nd Cir. 2006) (Pataki II).

throughout the United States and Canada. UNITE, at the time of the election at Respondent, had 21 joint boards, 16 located in the United States and 5 in Canada. UNITE had a few locals, who were direct affiliates and were not members of any joint boards. Joint boards are headed by a manager and also consisted of elected officers and delegates, who were generally officers or officials of the local unions. Joint boards also employed business agents and, at times, organizers.

The joint boards were organized by industry and/or by geography and were responsible for negotiation of contracts,⁴ involvement in grievances, including making the final decision on whether to proceed to arbitration on a particular grievance, and deciding on whether dues should be raised. Joint board officials consulted with representatives of the locals concerning all of these matters.

One of UNITE's joint boards was named the Disability Services and Allied Workers Joint Board (DSAW). It was located at 275 Seventh Avenue on the 14th Floor, and its co-managers were Richard Rumelt and Robert Jordan. It consisted of 6 local unions. They were: Local 41, located in Ellenville, New York; Local 62-32, located in New York, New York; Local 189, located in Kingston, New York; Local 32J, located in Stamford, Connecticut; Local 919, located in Yonkers, New York; and Local 1904 located in Queens, New York.

Rumelt had previously been an official of Local 8422 and Local 10 of UNITE, which were locals that represented garment workers. It was decided sometime in the early to mid-2000s that these locals would be merged into the New York Metropolitan Joint Board. At that time, Rumelt started the DSAW and began to organize employers that employed workers in the MRDD⁵ industry.

Over the next several years, DSAW under Rumelt's leadership organized four or five employers, who performed MRDD services, and as noted, consisted of the 6 locals described above.⁶

UNITE's constitution provided for a General Executive Board (GEB) and an Executive Board. The GEB consisted of the international president, secretary-treasurer, two executive vice-presidents and twenty-five vice-presidents. The Executive Board was made-up of the international president, secretary-treasurer and two vice-presidents. The GEB included: Bruce Rayner, UNITE's international president; Edgar Romney, secretary-treasurer; and its two international executive vice-presidents, William Lee and Mark Fleishman. The GEB also consisted of UNITE's vice presidents: Noel Beasley, Ernest Bennett, Harold Bock, Gary Bonadonna, Clayola Brown, May Chen, Susan Cowell, Angelo de Costa, Alexandra Dagg, Lynne Fox, John Gillis, Jean Harvey, Robert Jordan, Christine Kerber, Wilfredo Larancuent, Joseph Lombardo, David Melman, Gail Meyer, Warren Pepicelli, Harris Raynor, Richard Rumelt, Lynne Talbott and Christina Vasquez.⁷

Romney and Chen were managers of the New York Metropolitan Joint Board, which was

⁴ Generally, collective bargaining agreements are signed by the manager or other representative of the joint board.

⁵ MRDD stands for mental retardation and developmental disabilities.

⁶ The record is uncertain as to whether all of these locals represented employers involved in MRDD functions. The record does reflect that Local 919 did represent MRDD workers.

⁷ These 25 vice-presidents were also officers of various local and joint boards.

located at UNITE's headquarters at 275 Seventh Avenue, New York, New York.⁸ That joint board consisted of 5 local unions, who, in turn, employed 14 business agents.⁹

The officers of UNITE, detailed above, were elected at UNITE's convention, which consisted of local unions and joint board delegates. These delegates elected the International's officers. The officers met three times a year as an executive board. The top international officers comprise an executive committee, which may act for the executive board between executive board meetings.

Membership in UNITE can be obtained if the individual is actively attached to an occupation or industry within the jurisdiction of UNITE.

In order to run for local union office or as a delegate to a convention, an individual must be a member in good standing for at least a year. To run for international office, an individual must be a delegate to the quadrennial conventional and be a member in good standing for UNITE for at least two years.

Article 22 of the UNITE Constitution provided for a dues minimum of \$21.20 per month or \$5.30 per week. An affiliate joint board can set aside higher dues, which must be approved by a majority vote of members (affiliate) or delegates members or executive members (joint board).

The constitution also detailed that the minimum dues would be increased by \$.50 for weekly dues or \$2.00 for monthly dues once a year from 2003-2005. Starting in 2007, minimum increases will be determined via a formula based up the overall increase in member's wage increases.

Article 16 of the UNITE Constitution provides that members or officers can be expelled, removed or disciplined for various reasons, including working as a strikebreaker. Members have the right to file charge with the secretary of the appropriate body. Article 17 provides for hearing procedures for the disposition of such charges.

According to Article 20 of the UNITE Constitution, all local unions, which are part of a joint board, must submit all disputes to the joint board. The chief executive of the joint board or directly affiliated local must request the international president's authority for strikes in excess of seven working days.

The constitution further requires that there shall be a general convention every four years, that the GEB meet three times a year and that affiliates hold periodic meeting with their memberships.

The grievance procedure was generally set forth in each individual affiliate contract, which, as noted above, was normally negotiated by and signed by joint board officials. Individual grievances would generally start with a shop steward, and if he or she cannot resolve it, a business agent would become involved. If the business agent could not resolve the matter, it would be turned over the joint board manager or official. The joint board manager, in

⁸ As noted above, the DSAW was also located at the same address.

⁹ Robert Stalosky, Richard Guido, Maximo Reyes, Rosemary Lyons, Sarah Martinez, Joseph Dellcopini, Joseph Longo, David Johnson, Evans Hurtimu, Joana Schrum, Emily Lee, Ferdinand New, Marcello Cornell, Manny Rodriguez and Rodrigo Cornell.

consultation with other union representatives, made the decision on whether to proceed to arbitration.

UNITE owned the building at 275 Seventh Avenue, New York, New York, where it housed its general offices, plus several joint boards and locals, including the DSAW. UNITE also owned the Amalgamated Bank. UNITE also was involved with the following benefit funds: UNITE National Retirement Fund, UNITE National Health Fund and the UNITE Staff Retirement Fund.¹⁰

IV. UNITE's Organization of Respondent's Employees

As related above, an organizing campaign was commenced by UNITE among Respondent's employees in the spring of 2003. The record is not entirely clear as to precisely which entity of UNITE, the individuals, who organized Respondent's employees, belonged.

In this regard, Respondent introduced a number of documents from that organizing campaign in 2003. They were issued by an entity named "UNITE Disability Services Council (DSC), AFL-CIO. These documents also referred to a website for the DSC, www.unitedsc.org. One of the documents identifies Wilma Neal as the director of DSC, as does a business card given by Neal to Raymond DeNatale, Respondent's executive director, during the course of the campaign. The business card also identifies Neal as the director of UNITE DSC and lists a phone number of 212-265-7000 and a fax number, 212-489-6598.

General Counsel presented two witnesses, Romney and Richard Guido, a business agent for UNITE. Romney testified that he had heard of the DSC and believed that it was part of the DSAW and under the direction of Rumelt. Romney also testified that he had heard of the name, Wilma Neal, but that he was unaware that she was president or director of the DSC under Rumelt. Guido was aware of the DSAW that was managed by Rumelt and that this joint board was organizing MRDD employers, but was not aware of an entity called DSC.

Romney further testified that sometime in 2004, he had a conversation with Rumelt at the UNITE offices.¹¹ Rumelt informed Romney that he was trying to get his joint board to grow and to organize other disability facilities. Rumelt added that there had been an organizing campaign conducted at Respondent and that the organizing was done by organizers from the International. Rumelt also told Romney that there had been an election at the facility, and it had still not been resolved.

Romney also elaborated on that testimony by stating that Rumelt's joint board (DSAW) had only one organizer on its staff, so the International sent in organizers for the campaign, which was not an unusual occurrence within UNITE.

Testimony was adduced in the prior hearing held before me concerning UNITE's organizing campaign. I found as follows:

UNITE began its organizing campaign in early April of 2003. From April 16 to April 22 UNITE conducted what was referred to by its coordinator of organizing Allison Duwe as a

¹⁰ The funds were jointly administered by trustees of the funds, consisting of UNITE officers and representatives of employers.

¹¹ I note that both of the joint boards were located at the same address.

“blitz,” which consisted of 11 organizers making home visits at times unannounced, to the homes of employees of IRI. These visits sometimes lasted as long as a few hours, and at times were conducted by more than one organizer at a time. Duwe alone visited 35-50 different IRI employees during the “blitz,” and of those, some were visited as many as five times. All of these visits were conducted by paid, professional organizers who had received training from the union or affiliated entities such as the AFL-CIO.

After April 22, 2003, three organizers, including Duwe worked on the campaign and continued its practice of household visits. A day or two before the mail ballots were sent out, June 2, 2003 one additional organizer returned to the campaign for a few days.

Additionally, UNITE’s directory lists Wilma Neal as a national organizing official with a title of “MRDD Director.” This listing gives Neal’s phone and fax numbers, which were the same numbers that appeared on the business card, indentifying Neal as Director of the DSC. The UNITE’s directory does not mention the DSC, but does, as related above, include the DSAW mentioning Rumelt and Jordan as co-managers. There is also no reference to the DSC in the portion of the directory that refers to the DSAW.

The documents submitted by Respondent, which do refer to the DSC, include the following:

UNITE! DSC
Disability Service Council

The UNITE Disability Services Council (DSC)

Welcome to the UNITE Disability Services Council! Our council is made up of over one thousand direct care and professional employees across New York State who care for the mentally retarded and developmentally disabled (MRDD). We are committed to building a movement for MRDD workers statewide to improve wages, win respect [and] dignity on the job, and maintain the quality of care we are accustomed to providing.

If you are a UNITE member or an MRDD worker who is interested in organizing at your workplace, please explore the information on this site and feel free to contact us with any questions or comments.

Wages

UNITE fights for better funding for the agencies they represent by using this political power at the state level, where the decisions on funding are made. We get our political power through our membership, representing over 250,000 workers across the country, and through our Political Action Committee, which lobbies aggressively for better wages in the MRDD industry.

Case Studies

5 *"I've been working at ARC for five years. Before the union, the agency would lose good employees because they didn't pay us what we were worth. We were able to fight to get better pay and make the improvements we needed so we could really care for the consumers. I'm pleased that our consumers know that the staff [they] see today will be with them tomorrow too."*

10 *–Carl Washington, Day Treatment*

15 *"Before we went union, our raises were 1-2% depending on your evaluation. We won our union and negotiated our contract. In the first year, our raise was anywhere from 7-18% depending on seniority. Because we have a union contract, we will continue to build on the raise every year. The union worked with us, the politicians, and the agency to get more money from the state. The union held us win the raises we know we deserve."*

20 *–Jim Lynch, Residential Specialist¹²*

Quality Care

25 UNITE recognizes that one of the biggest problems facing the MRDD industry is low staff levels and high turnover. It takes the right kind of person to do such a demanding job for the wages that are available, and oftentimes there just aren't enough of these people. UNITE [is] fighting to raise wages and improve conditions in the industry to help cut down on turnover and give the consumers some stability in the workforce that cares for them.

30 UNITE also believes that it is the MRDD workers themselves who can best address issues [of] care, and work with management to solve them. We fight for workers' rights to be more involved in these issues and their solutions.

35 *"We are constantly short staffed at my house. I finally got fed up. I was tired of hearing excuses and not seeing any results. I realized the only way we were going to solve the problem was if staff took matters into their own hands. I was skeptical, but through the union we drew up a petition and the whole staff signed it. In the petition, we demanded that management respond immediately to the shortage of staff in the house, because it was not only taking its toll on us, but on the consumers as well. We presented the petition to the executive director of the agency, and within two weeks there was a new employee hired at the house who was medically certified and had a CDL."*

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50 ¹² The document also contained pictures of two individuals, purportedly Washington and Lynch. It also contained pictures, purportedly showing its members lobbying in the NY State Capitol.

I realized after this experience that having a union was the only way to get our issues heard and resolved. Individually, management did not take our concerns seriously, but when we stood together as our union, they did. I really believe that being members of UNITE has helped us improve the quality of care we provide to the consumers because for the first time, we, as direct care workers, can take our own steps towards solving the problems that affect consumers every day."

–Bob Hildenbrand, Reed House¹³

Lobby Day

UNITE DSC members have lobbied every year for better wages for MRDD direct care staff and better funding for MRDD agencies. The UNITE DSC has worked for years to provide a strong voice in Albany for caregivers for the disabled, and to bring respect and professionalism to this difficult and important work.

This year, the DSC brought its members to Albany to lobby for its "Agenda 2003 for Caregivers for the Disabled." The members lobbied their legislators [for] the four main points of the Agenda after weeks of preparation and trainings around the state.

Here you can read the Agenda and see some pictures from the event. If you would like to participate in future lobby days, contact the DSC at 212-265-7000 ext. 503.

UNITE! Agenda 2003 for Caregivers for the Disabled

UNITE represents 90,000 active and retired members throughout New York State—in the apparel and textile industries, industrial laundries and light manufacturing. And we also represent over 1,500 caregivers for the disabled.

These workers, employed by non-profit agencies funded by New York State, do some of the hardest jobs in the world: taking care of mentally retarded adults who can't care for themselves. The intense demands of their jobs are often compounded by low wages, prohibitively expensive healthcare benefits and lack of respect on the job. As a result of these difficult conditions, turnover is very high—on average, 30-50% a year! And the clients suffer when their caregivers are forced to find new work.

At the facilities UNITE represents, we have been able to combat this problem and stabilize employment rates by working for fairer wages and benefits and respect on the job. That means better working conditions, better care for clients and stronger agencies.

Voice on the Job

¹³ The document also contained a picture of Hildenbrand.

UNITE members have a say in how their jobs are done. And why shouldn't they? They spend hours and hours a day caring for consumers, and understand those consumers' needs. Through having a union, UNITE members have the right to negotiate with management over their working conditions, and to protect those conditions in a contract. They also have access to grievance procedure, which gives workers the right to a fair trial before an impartial judge: they are disciplined.

"I've worked with the disabled for the past 8 years. Having a union at New Horizons has helped those of us who live and work with the consumers to have a say in how care is provided. There is a real union difference. Union workers sit on committees with real power. We have a grievance procedure that helps us when management is wrong. Most importantly, we have the right to negotiate and vote on important changes before they take place. At New Horizons, management doesn't have the final say. We can speak up without fear. For us, the union is an important part of our agency."

–Rebecca Roy, Direct Care Worker¹⁴

Based upon the above evidence, the precise status of the DSC is unclear, and it is uncertain whether the DSC was part of or under the auspices of Rumelt or the DSAW or of the International. I find it most likely that the DSC was simply a name created by Neal, the International's "MRDD Director" and an organizing official of the International to utilize in organizing campaigns for MRDD facilities. I also conclude that the organizing conducted at Respondent's facilities was conducted by Neal and other International representatives, such as Allison Duwe, but it coordinated with Rumelt of the DSAW. I further find, consistent with Romney's testimony, that had Respondent not filed objections to the election and agreed to bargain with UNITE, that Rumelt and the DSAW Joint Board would have been assigned the servicing of the shop by UNITE and the negotiation of the contract with Respondent.

V. The Merger of UNITE and HERE

In July 2004, UNITE merged with the Hotel Employees Restaurant Employees Union (HERE). The merged unions' name was UNITE HERE. The merged unions' headquarters was UNITE's former headquarters at 275 Seventh Avenue, New York, New York.

After the merger, all of UNITE's former joint boards became joint boards under UNITE HERE. The manager and local staff of these joint boards remained the same. HERE also had its joint boards, which also retained the same HERE officials in the new merged UNITE HERE joint boards.

Sometime in 2006, the DSAW merged with a former HERE, Local 37 and formed the Airport and Racetrack Allied Workers Joint Board (ARAW). ARAW had many more members

¹⁴ These documents also contain a picture of Rebecca Roy, as well as pictures of DSC members meeting with legislators during UNITE DSC Lobby Day.

and shops than DSAW.¹⁵ Thus, the name of the merged joint boards was changed, the “disability services” portion of the prior UNITE joint board was removed and the merged joint board became known as ARAW. However, Rumelt retained his title as co-manager of the merged joint board along with Stephen Papageorge, who had been a former HERE vice-president and who had also been the president of Local 37 of HERE.

All of the DSAW’s locals initially were included in the merged joint board of ARAW. They included the local or locals that represented disability employees. The record is unclear as to how many of DSAW’s locals represented MRDD workers. It is clear that Local 919, located in Yonkers, New York, represented such employees, which included at least one contract with an employer named Richmond. No evidence was adduced that any of the other locals in DSAW¹⁶ represented disability workers although Romney’s testimony suggests that at least some of these locals did represent such employees.

The record is also uncertain as to which locals from the DSAW Joint Board were still in existence when the joint board merged into ARAW in 2006. The record does reflect, however, that by 2009, three of these locals were still in ARAW.¹⁷ Of the other three locals, Local 62-32 had been transferred into UNITE HERE’s New York Metropolitan Joint Board, managed by Romney, Local 32J had been transferred to the UNITE HERE New England Joint Board and Local 41, located in Ellenville, did not appear in the 2009 UNITE HERE directory, suggesting that this local was no longer in existence by 2009.

After the merger, UNITE HERE had two co-presidents, Bruce Raynor, former president of UNITE, and John Wilhelm, former president of HERE. The Executive Board of UNITE HERE consisted of the former vice-presidents of UNITE and of HERE, who all became international vice-presidents of UNITE HERE, plus the two co-presidents, and the executive vice-president of UNITE HERE.¹⁸

All former officers of affiliates of UNITE and HERE continued to serve in their same capacities with UNITE HERE. Richard Guido testified that the same business agents that worked with him under UNITE continued to work as business agents for the New York Metropolitan UNITE HERE Joint Board.

The dues structure did not change after the merger and the minimum amounts of dues were still determined by convention. The local unions and joint boards had the authority to increase dues as they had under UNITE. However, prior to the merger, HERE had a lower dues structure than UNITE, particularly since HERE represented workers in stadiums and arenas, who worked part-time and seasonally. There were some efforts to increase dues for some former HERE affiliates to bring their dues up to the former UNITE’s dues levels. Thus, there were some increases in dues for former HERE affiliates under the merged UNITE HERE Union. Some former UNITE affiliates also increased their dues for several reasons during the time of the merged union.

¹⁵ According to Romney, ARAW had about 25 contracts and DSAW had 4-5 contracts with disability employers.

¹⁶ Locals 41, 62-32, 189, 32J and 1904.

¹⁷ Locals 189, 919 and 1904.

¹⁸ The executive vice-presidents of UNITE HERE were all former officials of UNITE and HERE and with the co-presidents and the Canadian directors constituted the Executive Committee of UNITE HERE.

After the merger, the collective bargaining and grievance arbitration process remained the same and was carried by the prior officials and representatives of both former UNITE and HERE while under the merged UNITE HERE Union.

Upon the merger of the two unions, UNITE's National Retirement Fund merged with Here's National Retirement Fund. However, all of the union trustees of the former UNITE Retirement Fund became union trustees of the merged UNITE HERE Retirement Fund along with former trustees from the former HERE Retirement Fund.

UNITE's former headquarters, which had been owned by UNITE at 275 Seventh Avenue, became the property of the merged union. Similarly, the Amalgamated Bank, which was also owned by UNITE prior to the merger, became joint property of UNITE HERE.

VI. The Disaffiliation from UNITE HERE

As a result of disputes that arose between the former officers of UNITE and the former officers of HERE over various issues, the joint boards of UNITE HERE held disaffiliation votes on whether or not to disaffiliate from UNITE HERE. All but two of the former UNITE joint boards voted to disaffiliate from UNITE HERE. The only two original UNITE joint boards that voted not to disaffiliate from UNITE HERE were the New England Joint Board and ARAW, which, as detailed above, was a merged joint board consisting of DSAW and Local 37 of HERE. At the time of disaffiliation, which occurred in early 2009, ARAW had five locals. All of these locals also voted not to disaffiliate.¹⁹ This included Local 919, which, as noted above, was a local that included disability employees and had been part of DSAW. Locals 189 and 1904 were also part of DSAW, but the record is uncertain to whether these locals included representation of disability employees. Local 37 was a former HERE local. The record is silent about Local 117, except that it was not a former UNITE local. Rumelt and Papageorge remained with UNITE HERE and with ARAW.

The New England Joint Board, which, as noted, voted not to disaffiliate and to remain with UNITE HERE, had a membership of 8,750 members in 2009 and 7,224 members in 2010. As noted above, DSAW had six locals prior to the merger. By 2009, only three were still affiliated with ARAW. They were the three locals that voted not to disaffiliate, Locals 189, 919 and 1904. Local 189 reported to the Department of Labor 560 members for 2009, Local 919 reported 417 members for 2010 and 328 members for 2009, and Local 1904 reported 661 members for 2010 and 555 for 2009.

Of the other former members of DSAW, Local 32J moved to the New England Joint Board, which as already discussed, voted not to disaffiliate, but whose numbers were already counted in assessing the loss of UNITE's memberships. Local 62-32 did vote to disaffiliate from UNITE HERE and was part of the New York Metropolitan Joint Board. The sixth former DSAW local, Local 41, was apparently either out of existence or had merged with another local or another union. The record is incomplete on this issue.

VII. Workers United

After the vast majority of the former UNITE joint boards voted to disaffiliate from UNITE HERE, these factions held a convention on March 21, 2009 and voted to form Workers United. It was made up solely of joint boards and local unions that had constituted UNITE. Like UNITE,

¹⁹ Locals 37, 117, 189, 919 and 1904.

Workers United was to have an Executive Board, General Executive Board and an Executive Committee with the same officers. The joint boards and locals of Workers United were all former UNITE boards or locals or part of merged or joint boards, which had been previously associated with UNITE.

Edgar Romney was initially elected president of Workers United. By July 2009, Bruce Raynor, the former president of UNITE, became president of Workers United, and Romney became secretary-treasurer of Workers United, a position that he had held at UNITE. Mark Fleishman, who had been an executive vice-president at UNITE also joined Workers United in July 2009, along with Raynor in the position of vice-president.

Noel Beasley and Lynne Fox, who were vice-presidents at UNITE, became executive vice-presidents of Workers United. Alexandra Dagg, who had been vice-president and a representative of the UNITE Canadian Office, Ontario Council with UNITE, became secretary-treasurer and Canadian director and an Executive Committee member at Workers United. The record does not reflect what position Dagg held after Bruce Raynor became president of Workers United in July 2009 and Romney became secretary-treasurer.

UNITE also had 21 vice-presidents and other General Executive Board members.²⁰

Of these 21 vice-presidents, six of them left UNITE HERE prior to the disaffiliation as they did not appear in the UNITE HERE Directory for 2009. They were Cowell, de Costa Jordan,²¹ Lee, Lombardo and Talbott.

Of the remaining fifteen former vice-presidents of UNITE, twelve of them became vice-presidents of GEB members of Workers United.²² The remaining three former UNITE vice-presidents, Rumelt, Warren Pepicelli of the New England Joint Board and Ernest Bennett, who had been UNITE's director of organizing, all remained with UNITE HERE and did not join Workers United.

Workers United's GEB also consisted of six individuals, who were not members of UNITE's GEB.²³ Of these six Workers United board members, one, William Towne, had previously been a UNITE officer, but not a GEB member.²⁴ Rykuny, Luebbert and Aristes were all prior member of UNITE HERE's GEB.²⁵

²⁰ William Lee, executive vice-president and 20 vice-presidents: Ernest Bennett, Harold Bock, Gary Bonadonna, Clayola Brown, May Chen, Susan Cowell, Angelo de Costa, John Gillis, Jean Harvey, Robert Jordan, Christine Kerber, Wilfredo Larancuent, Joseph Lombardo, David Melman, Gail Meyer, Warren Pepicelli, Harris Raynor, Richard Rumelt, Lynne Talbott and Christina Vasquez.

²¹ Jordan, as noted above, had been the co-manager with Rumelt of the DSAW. In fact, the record does not even establish whether Jordan was ever employed by UNITE HERE or by ARAW since it does not establish when or why he left UNITE or UNITE HERE.

²² Bonadonna, Bock, Brown, Chen, Gillis, Harvey, Kerber, Larancuent, Melman, Harris Raynor, Meyer and Vasquez.

²³ William Towne, Jane Rykuny, Tim Luebbert, Lino Aristes, Kate Gerken and Sandi Eckland.

²⁴ He had been a manager and secretary-treasurer of the Amalgamated Northeast Regional Joint Board at UNITE. Towne was also a vice-president and member of the GEB of UNITE HERE.

²⁵ Rykuny was also vice-president of the Minnesota State Council. Luebbert was the vice-

Continued

Gerken had been the manager of the Rocky Mountain Joint Board while at UNITE HERE although not a GEB member. When she joined Workers United, she had the same position²⁶ and became a GEB member of Workers United. Eckland was the president of Local 50, located in Anaheim, California at UNITE HERE although not a board member. At Workers United, she did become a GEB member as a vice-president of Local 50 in Anaheim, California, which presumably also voted to disaffiliate from UNITE HERE.

Wilma Neal, who, as noted above, identified herself as director of UNITE Disability Council, but was also the MRDD director in the organizing department for UNITE. Her name does not appear in the UNITE HERE directory for 2009 or the Workers United directory. The record does not reflect whether she ever was employed in any capacity by UNITE HERE or whether she had any dealings with DSAW after the organizing campaign at Respondent concluded prior to the merger. Indeed, the record does not disclose when or why she terminated her employment at UNITE.

Article 18 of the Workers United Constitution details a “benchmark” minimum dues of \$31.40 for monthly dues and \$7.85 for weekly dues. It also provides that the GEB shall develop policies for affiliate dues systems. Starting in July 2011, the constitution provides that all members' dues will be increased pursuant to a formula based upon members' average wage increases across the industry. No affiliate can set higher dues except by a majority vote of delegates at a general or special meeting.

Workers United also had virtually the same membership requirements and eligibility for local or international officers, amendments or repeal of constitutional provisions, complaint procedures, strike authorizations, approvals and convention and meeting requirements as UNITE.

Further, Workers United had the same collective bargaining structure as well as grievance and arbitration structure as UNITE, as well as UNITE HERE.

As a result of the disaffiliation vote, litigation ensued between UNITE HERE and Workers United involving numerous issues, including the disposition of UNITE HERE's assets. Sometime in 2010, the parties reached a settlement agreement with respect to the issues in dispute. As a result of this agreement, Workers United obtained ownership of the Amalgamated Bank while UNITE HERE retained ownership of UNITE's former headquarters at 275 Seventh Avenue, New York, New York. Workers United is now located at 49 West 27th Street, New York, New York.

As noted above, when UNITE and HERE merged, UNITE's Retirement Fund merged with HERE's Retirement Fund although the former trustees from UNITE continued as trustees in the merged fund. Despite the disaffiliation, the merged retirement funds remained in existence except that the trustees, who were formerly UNITE employees, are Workers United employees and claims are processed the same way through the joint boards, who are, as related above,

president of Local 74 and Aristes was vice-president of Conseil de Quebec. By the time that they became GEB board members of Workers United, Luebbert and Rykuny had become vice-presidents of the Chicago and Mid-West Regional Joint Boards and Aristes had become vice-president of the Union des Travailleurs Industriels et de Service (UTIS) in Montreal, Quebec.

²⁶ The Rocky Mountain Joint Board, which had previously been a HERE joint board, voted to disaffiliate from UNITE HERE.

now primarily affiliated with Workers United.

Prior to the execution of this settlement stipulation, Workers United had signed an affiliation agreement with the Service Employees International Union (SEIU), dated March 22, 2009. The merger had virtually no effect on the structure or operations of Workers United. All property and assets of Workers United, including the Amalgamated Bank, continued to be owned by Workers United. Workers United did agree to pay to the SEIU a per capita tax on each of its members.

The settlement stipulation between UNITE HERE and Workers United includes the following language:

“SEIU shall have exclusive jurisdiction for organizing workers in healthcare property services and the public sector, including without limitation, home care workers, child care workers, and Mental Retardation/Developmental Disabilities workers.”

VIII. Workers United Requests Information and Bargaining

Subsequent to the Board decision certifying UNITE as the collective bargaining representative of Respondent’s employees, Romney received a telephone call from UNITE’s president, Raynor, as well as from Workers United’s counsel, Ira Katz, notifying Romney that Workers United wanted Romney’s joint board, the New York Metropolitan Joint Board, to be assigned to Respondent’s shop in order to negotiate a collective bargaining agreement.

There is no evidence that either Romney or anyone else associated with this joint board had any experience negotiating contracts covering employees engaged in the MRDD industry.

Consequently, on November 30, 2010, Katz, on behalf of Workers United, sent a letter to Frederick Braid, counsel for Respondent, which reads as follows:

Frederick Braid
Holland & Knight
31 West 52nd Street
New York, NY 10019

Re: Independence Residences

Dear Mr. Braid:

As you are aware, the Board certified UNITE as the bargaining representative for its Direct Care Workers, Residential Habilitation Specialists, Day Habilitation Workers, Medical Care Workers and Maintenance employees at Independence Residence’s various facilities. Worker United is UNITE’s successor union. On behalf of Workers United, I am requesting that Independence Residences negotiate a collective bargaining agreement covering this unit. Please provide me with available dates.

In order to prepare for that bargaining, I would appreciate your providing me with the following information concerning unit employees:

1. A complete seniority list showing name, social security number, job title, hire date, pay rate, job classification, and the amount and date of last three pay increases.

2. A complete home address, phone numbers (cell and residence) and email address for each employee.

3. A copy of your employee handbook and any other documents concerning employment related policies, i.e. attendance, substance abuse, rules, personnel policies, etc.

4. A copy of all employee benefit programs, including summary plan descriptions, for all benefits included but not limited to medical, life, disability, retirement and other fringe benefits available to employees, including the employer and employee cost for each, if any.

5. Copies of all current job descriptions.

6. Copies of all disciplinary (including attendance) notices, warnings or records of disciplinary personnel actions for the last year.

7. A copy of any company wage or salary plan, including merit pay plans.

8. A copy of all reports of occupational injuries and illnesses, including copies of the OSHA 200 logs for the past five years.

9. A copy of all job accident reports for the last five years.

10. A copy of all workers' compensation claims, along with a copy of any document showing any resolution of such claims, whether by settlement or litigation, for the last five years.

Thank you very much.

Very truly yours

Ira Jay Katz
Associate General Counsel

Cc: Edgar Romney

On December 21, 2010, Respondent replied to the above letter by its new counsel, Louis DiLorenzo. It reads as follows:²⁷

²⁷ I note that the letter from Workers United was on Workers United/SEIU Affiliate letterhead and listed Workers United's address at 49 West 27th St., New York, New York, which was not UNITE's previous address at the time of the election.

December 21, 2010

VIA FACSIMILE AND OVERNIGHT MAIL

Mr. Ira J. Katz
Associate General Counsel
Workers United
49 West 27th Street, 3rd Floor
New York, NY 10001

Re: Independence Residences, Inc.

In response to your letter to Fred Braid dated November 30, 2010, please be advised that we now represent Independence Residences, Inc. ("IRI") with respect to this matter.

IRI believes that the split decision from the NLRB upon which the certification is based is inconsistent with established law and the core principles of the National Labor Relations Act. In addition, it would be inappropriate to recognize Workers United because Workers United is not the labor organization that filed the representation petition, and only about twelve percent of our current workforce participated in the disputed election back in 2003.

To recognize Workers United as the exclusive bargaining representative under these circumstances would violate the rights of our employees, which IRI will not do. We therefore respectfully decline to provide the requested information and respectfully decline to bargain.

Very truly yours,
Louis P. DiLorenzo

Apparently, as a result of this response from Respondent, there was some communication between UNITE HERE and Workers United. This resulted in a letter being sent by Thomas Snyder, chief of staff of UNITE HERE, to Respondent disclaiming interest in representing Respondent's employees and recognizing Workers United, SEIU as a successor to UNITE for the purposes of representing Respondent's employees. The letter was dated January 20, 2011, and the parties stipulated that the disclaimer was based on the language in the settlement agreement between UNITE HERE and Workers United.²⁸

Although the letter was dated January 12, 2011, it was not received by Respondent at or around that time.

On May 20, 2011, Snyder sent another letter to Respondent referring to the original letter sent on January 20, 2011, which was attached. Both of these letters are set forth below:

²⁸ As noted above, the agreement provided that SEIU shall have exclusive jurisdiction for organizing Mental Retardation/Developmental Disabilities workers.

UNITEHERE!
1775 K Street, NW, Suite 620
Washington, DC 20006
TEL (202) 393-4373
FAX (202) 223-6213
WWW.UNITEHERE.ORG

January 12, 2011

Executive Director Raymond DeNatale
Independence Residences, Inc.
93-22 Jamaica Ave. 2nd Floor,
Woodhaven, NY 11421

Re: Disclaimer of Interest

Dear Mr. Natale:

UNITE HERE disclaims any interest in representing the employees of Independence Residences, Inc. UNITE HERE recognizes Workers United, SEIU as the successor of UNITE for the purposes of representing the employees of Independence Residences, Inc. and any related matters pertaining to National Labor Relations Board Case No. 29-RC-10030 and/or Case No. 29-CA-25657.

Sincerely,

Thomas Snyder, Chief of Staff

UNITEHERE!
1775 K Street, NW, Suite 620
Washington, DC 20006
TEL (202) 393-4373
FAX (202) 223-6213
WWW.UNITEHERE.ORG

May 20, 2011

Raymond DeNatale
Independence Residences
93-22 Jamaica Ave. 2nd Floor,
Woodhaven, NY 11421

Dear Mr. Denatale:

Kindly see the attached letter which was originally mailed to you on January 12, 2011. Again, UNITE HERE disclaims interest in representing employees at Independence Residences.

Sincerely,

Thomas Snyder
Chief of Staff and VP

5

cc. Subash Viswanathan

10 As detailed above, the certificated unit consisted of eleven facilities of Respondent. It is undisputed that since the election, two of the facilities involved, Metropolitan Towers Residence I and Metropolitan Towers Residence II, have been combined and merged into New Metro Residence in Richmond Hill.

15 While the complaint alleges the appropriate unit to include the 11 facilities and the Board's certification refers to Appendix A, which also lists 11 facilities, general Counsel asserts that the certified unit should now include 10 facilities since the two former Metro residences have been combined into one facility, known as New Metro Residence in Richmond Hill. Respondent does not dispute this contention, but does contend that the other changes in the unit since the certification render a bargaining order inappropriate.

20 In this regard, Clifford Emmerich, Respondent's director of human resources, testified that since the election, Respondent has added four new day programs²⁹ and three new residential facilities.³⁰

25 Emmerich estimated that as of the date of the hearing, Respondent employed 234 employees covered by the unit description, including these additional facilities. However, when pressed on cross-examination, it appears that Emmerich's estimate was inflated. Thus, according to Emmerich, Respondent employed 24 employees at the four new day programs, 3 at the Rosario apartments, 14 at the Eastchester Residence and 13 at Radisch Residence. That comes to 54 additional new employees at these facilities, and when added to the 151
30 employees in the unit at the time of the election adds up to 205 employees.

General Counsel does not seek to expand the certification to include these new locations and asserts that the parties during bargaining could decide to include these facilities or another Board proceeding could assess whether these locations should be included in the unit.

35

IX. Analysis

A. Continuity of Labor Organization

40 Once a union is certified by the Board, a union enjoys a presumption of continuing majority support, and the employer has a corresponding continuing obligation to recognize and bargain with the union. *Minn-Dak Farmers Cooperative*, 311 NLRB 942, 949 (1993); *Burger Pits Inc.*, 273 NLRB 1001 (1984). Subsequent affiliation with a national or international organization or a different local union does not, standing alone, affect the union's representative status or
45 terminate the employer's duty to bargain with the union. *Minn-Dak Cooperative*, supra; *Toyota*

²⁹ 120th Street Hab and Afterschool Program in Richmond Hill, New York, Bronx Day Hab, Debart Day Hab in Woodhaven, New York and Long Island Day Hab in Old Bethpage, New York.

50 ³⁰ Eastchester Road in the Bronx, Elaine and David Radisch Residence in Ozone Park, New York and Rosario Apartment Residence in Woodside, New York.

of *Berkeley*, 306 NLRB 893, 899 (1992). This is because “the basic purpose of the National Labor Relations Act is to preserve industrial peace,” *NLRB v. Financial Institution Employees (Seattle First National Bank)*, 475 US 192, 208 (1986), and “the industrial stability sought by the Act would be disrupted if every union organizational adjustment were to result in displacement of the employee bargaining relationship.” *Id.* at 202-203.

The Board had traditionally applied a two-pronged test to determine whether an employer is obligated to recognize or bargain with a merged or disaffiliated union. The prongs were whether the merger vote occurred under circumstances satisfying due process and whether there was substantial continuity between the pre- and post-merger union. *Toyota of Berkeley*, *supra* at 899; *Minn-Dak Cooperative*, *supra* at 945.

In *Raymond F. Kravis Center for the Performing Arts*, 351 NLRB 143, 145-147 (2007), *enfd.* 550 F.3d 1183 (DC Cir. 2008) in response to the Supreme Court’s *Seattle First* decision, the Board abandoned the first prong described above, and announced that it would no longer inquire into “due process” issues with regard to union affiliation or merger votes. 351 NLRB at 147.

However, the Board made clear in *Raymond Kravis* that the other prong of its test regarding union affiliations’ substantial continuity between the pre- and post-merged unions remains in tact. *Id.* This standard is defined as follows: “An employer’s duty to recognize the union does not continue when the organizational changes are so dramatic that the post-affiliation union lacks substantial continuity with the pre-affiliation union.” *Id.* at 147; *Seattle First*, *supra*, 475 U.S. at 209 fn. 13.

The definition of how “dramatic” the changes need to be in order to justify a finding that substantial continuity has not been maintained after a merger has also been delineated by the Board. “To prevail, the respondent must demonstrate that the affiliation resulted in changes that were sufficiently dramatic to alter the identity of the association, and, thus, the substitution of an entirely different union as the employees’ representative.” *CPS Chemical Co.*, 324 NLRB 1018, 1020 (1997); *Western Commercial Transport*, 288 NLRB 214, 217-218 (1988).

The Board in *Raymond Kravis* also reaffirmed its long-standing rule in assessing this issue. The burden is on the party seeking to avoid its bargaining obligation. *Id.* at 147 fn. 30; *Deposit Telephone Co.*, 349 NLRB 214, 221 (2007); *CPS Chemical*, *supra*, 324 NLRB 1018, fn. 7.

I conclude that Respondent has fallen far short of meeting its burden of establishing that the changes resulting from the merger of UNITE into UNITE HERE and the subsequent disaffiliation from UNITE HERE resulting in the formation of Workers United were “sufficiently dramatic to alter the identity of the union and the substitution of an entirely different union as the employees’ representative.” *CPS Chemical*, *supra*. Cf. *Western Commercial Transport*, *supra*.

Indeed, to the contrary, the record overwhelmingly demonstrates that in the areas that the Board considers significant in assessing continuity, there have been little or no changes, and that Workers United is virtually the same labor organization as UNITE, despite the merger with UNITE HERE and subsequent disaffiliation from UNITE HERE by most of UNITE’s joint boards.

In making its continuity determination, the Board, supported by the Courts, compares the pre- and post-merger entities in light of a number of factors, including structure, administration, officers, assets, membership, autonomy, by-laws, size and jurisdiction. *May Dept. Stores v.*

NLRB, 897 F.2d 221, 228 (7th Cir. 1990); *NLRB v. Insulfab Plastics*, 789 F.2d 961, 966 (1st Cir. 1986).

An examination of these factors here confirms my conclusion, set forth above, that Workers United is virtually the same labor organization as UNITE.

Thus, upon the formation of Workers United, individuals from the former UNITE entities became members of Workers United without having to pay any initiation fees or transfer fees. *Raymond Kravis*, supra, 351 NLRB at 148; *Mike Basil Chevrolet*, 331 NLRB 1044, 1045 (2000); *CPS Chemical*, supra, 324 NLRB at 1021; *Sullivan Bros. Printers*, 317 NLRB 561, 564 (1995), enf. 99 F.3d 1217 (1st Cir. 1996).

The dues structure with regard to minimum dues and procedure for changes are similar in both the constitutions of UNITE and Workers United. Although there were increases in dues for Workers United members, these increases are small and are not evidence of discontinuity. *Raymond Kravis*, supra at 148 fn. 37; *Mike Basil Chevrolet*, supra, 331 NLRB at 1045; *CPS Chemical*, supra at 1022. *Central Washington Hospital*, 303 NLRB 404, 405 fn. 8 (1991).

Further, although Workers United by virtue of its subsequent affiliation with the SEIU is obligated to pay a per capita tax to the SEIU, that change from the practice under UNITE is far from sufficient to establish discontinuity. *Avante at Boca Raton Inc.*, 334 NLRB 331, 387 (2001); *May Dept. Stores*, 239 NLRB 661, 666 (1988), enf. 897 F.2d 221 (7th Cir. 1990).

A significant factor in assessing continuity is “continued leadership responsibilities by existing union officials.” *Western Commercial Transport*, supra, 288 NLRB 1214, 217 (1988). The Board has frequently relied upon similarity of union officers and representatives in the pre- and post-merger labor organization to support a finding of continuity of representation. *Raymond Kravis*, supra, 351 NLRB 148; *Deposit Telephone*, supra, 349 NLRB at 222; *CPS Chemical*, supra, 324 NLRB at 1022; *Minn-Dak Cooperative*, supra, 311 NLRB at 947; *May Dept. Stores*, supra, 289 NLRB at 666; *Newspapers Inc.*, 210 NLRB 8, 9 fn. 2 (1974); *Climax Molybdenum Co.*, 146 NLRB 508, 509 (1964).

Here, of the 29 former UNITE officers, 19 continued to work as union officers for Workers United, including President Bruce Raynor and Secretary/Treasurer Edgar Romney. Six former UNITE officers left the union before the 2009 split.³¹ Thus, only three former UNITE officers serving UNITE HERE did not move to Workers United.³²

Further, a substantial majority of officers and board members of Workers United were former UNITE officers and board members. UNITE HERE, at the time of the disaffiliation, had 21 joint boards. All, but two of them, disaffiliated from UNITE HERE and became affiliated with Workers United. Therefore, the factor of continuity of leadership, here, strongly supports a finding of continuity.

The constitutions of UNITE and Workers United are quite similar and provide for similar governing structures. These similarities include membership requirements, eligibility for local offices or international office, procedure for elections of international officers, procedure for bringing charges against union members or officials, procedure for repeal of portions of the

³¹ Susan Cowell, Angelo de Costa, Robert Jordan, William Lee, Joseph Lombardo and Lynne Talbott.

³² Richard Rumelt, Warren Pepicelli and Organizing Director Ernest Bennett.

constitution, requirements for frequently of conventions, GEB meetings and membership meetings. These similarities in structure and membership rights are further evidence of continuity of the two labor organizations. *Western Commercial Transport*, supra; *Mike Basil Chevrolet*, supra, 331 NLRB at 1045; *Sullivan Bros. Printers*, supra, 317 NLRB at 564; *May Dept. Stores*, supra, 289 NLRB at 666.

The evidence also discloses that the procedures, policies and constitutional provisions dealing with day-to-day issues of representation, such as grievance handling, arbitration decisions, contract negotiations, contract ratification and strike authorization are similar or identical *vis a vis* UNITE and Workers United. These similarities lend further support to a conclusion of continuity between the labor organizations. *Raymond Kravis*, supra, 351 NLRB at 148; *Deposit Telephone*, supra 349 NLRB at 222; *Avante at Boca Raton*, supra, 334 NLRB at 387; *Mike Basil Chevrolet*, supra, 331 NLRB at 1045; *Sullivan Bros. Printers*, supra, 317 NLRB at 564; *Minn-Dak Cooperative*, supra, 311 NLRB at 947; *Central Washington Hospital*, supra, 303 NLRB at 409.

The most valuable asset of UNITE, its ownership of the Amalgamated Bank, has been retained by Workers United as a result of the disaffiliation and negotiations with UNITE HERE. These discussions did result in the loss by Workers United of the former UNITE's headquarters at 275 Seventh Avenue, which was retained by UNITE HERE. However, this loss of assets is not particularly significant since it has little effect on the certified unit. Workers United has simply moved its headquarters to another address located in the same borough in New York City. Further, upon UNITE's merger with UNITE HERE, UNITE's Retirement Fund was merged with the UNITE HERE's Retirement Fund. However, the former trustees of UNITE's Retirement Fund became trustees of the UNITE HERE Retirement Fund. After the disaffiliation, this retirement fund merged, but the former UNITE trustees, who were trustees at the merged fund, retained their positions as trustees although they became Workers United employees. Claims are processed through the various joint boards as they had been under UNITE and UNITE HERE. As noted above, the vast majority of joint boards from UNITE HERE, which were UNITE joint boards, are now affiliated with Workers United. Most importantly, no evidence was adduced by Respondent that Respondent's employees, should Respondent sign a contract with Workers United providing for coverage of its employees by the merged retirement fund, will in any way be disadvantaged or their benefits be reduced. In such circumstances, the Board gives little weight to the merger of funds or assets, absent evidence that the assets involved would not be available to employees, and, accordingly, it had not been shown that such workers had fewer resources, which would be committed to their representational needs by the new organization than were available under the prior labor organization. *Deposit Telephone*, supra, 349 NLRB at 223; *CPS Chemical*, supra, 324 NLRB at 1024; *Sullivan Bros. Printers*, supra, 317 NLRB at 565; *Sullivan Bros. Printers v. NLRB*, 99 F.3d at 1229.

Respondent does not, and in fact, cannot contest the substantial evidence of continuity, detailed above, but does raise two somewhat related arguments, that such evidence is not determinative of Respondent's bargaining obligation based on the circumstances here.

Respondent asserts that since Section 9(a) of the Act creates a mandatory obligation on an employer to deal *exclusively* with the bargaining representative, whom the employees have chosen, said employer does not violate its bargaining obligation where confusion exists as to which union is the recognized or certified representative. *Newell Porcelain Co.*, 307 NLRB 877, 878 (1992), *enfd.* 986 F.2d 70 (4th Cir. 1993). It further contends that confusion results when the certified representative delegates its representational responsibilities, which it cannot lawfully do. *Goad Co.*, 332 NLRB 677 fn.1 and at 680 (2001). Finally, Respondent argues that General Counsel as the party asserting that a Section 9(a) relationship exists has the burden of proving

the existence of that relationship and has not done so here. *Continental Linen Services Inc.*, JD-53-10 (September 15, 2010).

Respondent notes that UNITE was the certified representative and then “ceased to exist” when it merged with UNITE HERE in 2004. Further, Respondent states that ARAW, the joint board that would have had responsibility for representing Respondent’s employees, rejected the option of affiliating with Workers United and remained affiliated with UNITE HERE. Since UNITE HERE has disclaimed interest in representing Respondent’s employees, Respondent contends that it was confused about who the proper representative of its employees was, and that since UNITE as the certified union cannot delegate its responsibilities, Respondent was under no duty to bargain with Workers United. *Goad*, *supra*; *Continental Linen*, *supra*.

I cannot agree with Respondent’s analysis of the facts here and conclude that the precedent that it cites in support of its contentions is inapposite.

I find, contrary to Respondent, that there was no confusion here concerning the representative of Respondent’s employees, and there was no attempt to transfer representational responsibilities and that Respondent had no right to refuse to recognize and bargain with Workers United.

Unlike the cases cited by Respondent,³³ Workers United requested bargaining with Respondent, not on the basis of any transfer of representational responsibilities, but on the basis that it is the successor union to UNITE, the certified representative of Respondent’s employees. Therefore, the issue is as framed by General Counsel whether or not Workers United is the successor union to UNITE, which is not a 9(a) issue, but, as detailed above, must be analyzed under continuity standards. Thus, as also related above, Respondent has the burden of proof as the party seeking to avoid its bargaining obligation. *Raymond Kravis*, *supra*, 351 NLRB at 147 fn. 10; *Deposit Telephone*, *supra*, 349 NLRB at 221; *CPS Chemical*, *supra*, 324 NLRB at 1018.

Newell Porcelain, *Goad* and *Continental Linen* are not to the contrary. Both *Goad* and *Newell Porcelain* involved attempts by one local union to transfer representational rights to another or a local to transfer such rights to an international. Further, *Newell Porcelain* recognized the principle that the local involved there could have lawfully affiliated with the international, but found in that case that the union created confusion in the employer’s mind that the international was attempting to supplant the local as the lawful representative. No such facts are present here.

Continental Linen is of course a decision of an administrative law judge, which has not been affirmed by the Board,³⁴ so it has minimal precedential value. In any event, although the case does involve a dispute over representational rights resulting from the disaffiliation of UNITE from UNITE HERE, the similarity to the instant case stops there.

In that case, the employer, unlike Respondent here, was presented with conflicting claims for representation of its employees from Workers United on the basis that Workers United was the successor union to the Regional Chicago and Midwest Joint Board, which disaffiliated from UNITE HERE, and from the local union, which did not disaffiliate from UNITE

³³ *Newell Porcelain*, *supra*; *Goad*, *supra*; *Continental Linen*, *supra*.

³⁴ The case was withdrawn after the judge’s decision.

HERE,³⁵ and was continuing to assert its representative status. Thus, the issue in *Continental Linen* was whether Local 151 or the joint board and its alleged successor, Workers United, was the 9(a) representative. In those circumstances, the judge concluded that the record was confusing as to whom the representative was, and he concluded that the General Counsel had not met its burden of proving that the joint board had been the exclusive representative of the employer's employees.

Here, there is no conflict between Workers United and UNITE HERE as to representational status or who the representative of Respondent's employees is, since UNITE HERE has disclaimed interest representing Respondent's employees. Therefore, *Continental Linen* is inapposite even if it were a Board decision.

Accordingly, I reject Respondent's 9(a) defense and conclude that the relevant issue is the continuity of representation between UNITE and Workers United.³⁶

Respondent argues in this regard that the relevant consideration in assessing continuity of representation is continuity of representation in the *affected bargaining unit*. *Chas S. Winner Inc.*, 289 NLRB 62, 69 (1988); *Western Commercial Transport*, 288 NLRB 214, 215 (1988); *Garlock Equipment Co.*, 288 NLRB 247, 248 (1988).

It further argues that DSAW, the joint board that organized Respondent's employees would have been assigned to bargain with Respondent if bargaining had commenced and if a contract had been reached would have been assigned to administer that agreement. Therefore, according to Respondent since DSAW became ARAW, and ARAW did not disaffiliate from UNITE HERE, and in fact is still in existence, it cannot be considered that Workers United is the successor union to UNITE *vis a vis* Respondent's employees.

Respondent further contends that during the organizing campaign, DSAW stressed its experience in representing employers that employed MRDD employees as well as the Disability Council's lobbying for better wages for MRDD staff. It also notes that Workers United has no officials or representatives that represent MRDD employees and no lobbyists dedicated to obtaining better wages for MRDD employees. Finally, Respondent emphasizes that all of the officials from UNITE or UNITE HERE, who dealt with or would have dealt directly with Respondent's employees, such as Neal, Jordan, Rumelt and Papageorge, have no affiliation whatsoever with Workers United.

In sum, Respondent asserts that the due to the "substitution of a MRDD-focused joint board with which the IRI employees would have been affiliated for a garment-based joint board, which they now would be affiliated, it is undeniable that these changes have substantially altered the identity of the union that the IRI employees elected to represent them."

³⁵ The local union (Local 151) had been the bargaining representative of the employer for many years prior to its merger with UNITE.

³⁶ Respondent contends that when it was organized, the Disability Council of UNITE as well as DSAW was involved. Therefore, since DSAW would have been assigned to service Respondent's facilities after the certification, and ARAW (which included DSAW) did not disaffiliate from UNITE HERE, Respondent argues that UNITE HERE is the 9(a) representative. I reject this contention, as noted above, since UNITE HERE does not so assert. However, I will consider Respondent's contentions *vis a vis* DSAW insofar as it relates to the continuity issue, discussed below.

I do not agree.

The problem with Respondent's arguments is that it ignores a significant fact that differentiates this case from the precedent that it cited.³⁷ That is that UNITE, the international union, was the certified representative and not the DSAW or the Disability Council. While Respondent is correct that UNITE would have assigned DSAW to service Respondent's employees, that did not happen because Respondent was still contesting the election. Therefore, there was no representation of Respondent's employees by DSAW, UNITE or any other entity. It is, therefore, inappropriate to speculate about how the representation of Respondent's employees would have been effectuated or which officials of UNITE would have been involved with Respondent's employees.

Therefore, the precedent cited by Respondent is clearly distinguishable since in each of these cases the local union was the recognized representative and the questions were whether that local had lost their autonomy by virtue of being affiliated with an international union or a different local union so that the "fundamental character" of the local was altered as a result of the affiliation. *Western Commercial Transport*, supra at 218; *Garlock Equipment*, supra at 248; *Chas Winner*, supra at 69. Here, since there has been no local representation to analyze, the continuity analysis must be centered on UNITE, the certified labor organization, and not DSAW, which was not on the ballot at the election.

UNITE as the certified labor organization has the right to select a local or a joint board to act as its agent to service Respondent's employees, and it can do so in any manner it chooses, changing them at will without consequence to its own status as exclusive representative of unit employees. *Mountain Valley Care*, 346 NLRB 281, 282-283, 288 (2006); *Nevada Security Innovations*, 341 NLRB 953, 955 (2004); *Vermont Marble Co.*, 301 NLRB 103 fn. 2 (1991) (local union's merger did not create a question concerning representation since international was bargaining representative and mergers affected no change in the identity of the bargaining representative).

Thus, while UNITE could have and would have selected DSAW to act as its agent in servicing Respondent's employees, it did not ever do so since the results of the election were still in dispute. Seven years later, Workers United as the successor to UNITE has the right to select a joint board to service Respondent's employees, and it has selected the New York Metropolitan Joint Board. Workers United would have the right to make that selection even if ARAW had voted to disaffiliate from UNITE HERE and had joined Workers United. *Mountain Valley*, supra.

Respondent's contentions that DSAW allegedly "organized" Respondent's employees is incorrect since, in fact, it was UNITE representatives and officers, who organized Respondent, headed by Neal, UNITE's director of MRDD organizing. Respondent's reliance on Rumelt's alleged role in organizing is misplaced since there was no evidence that he had any direct role in organizing Respondent's employees. Indeed, there is no evidence in the record that Rumelt ever had any contact with employees of Respondent or Respondent itself during the organizing campaign. Therefore, neither Rumelt's failure to become employed by Workers United nor his decision to remain as an employee of UNITE HERE, nor ARAW's decision to remain with UNITE HERE can be construed as affecting continuity of representation for Respondent's employees.

³⁷ *Chas Winner*, supra, *Western Commercial Transport*, supra and *Garlock Equipment*, supra.

Similarly, no evidence was adduced that either Papageorge or Jordan ever had any role in organizing Respondent's employees, or, indeed, any contact with Respondent's employees or Respondent's officials at any time. Therefore, their failure to become officials of Workers United has no significance in assessing the identity of the labor organization representing Respondent's employees.

Neal did presumably have contact with Respondent's employees during the organizing as well as with Respondent's officials and also signed campaign documents on behalf of UNITE. However, contrary to Respondent, her absence as an employee of Workers United is insufficient to establish discontinuity of representation. Notably, as detailed above, she was an official of UNITE and not DSAW, and there is no evidence that she ever became associated with or was employed by ARAW or UNITE HERE. Thus, it appears that she left that employ of UNITE at some point between 2004 and 2009. It is not unexpected that after seven years, there will be some turnover in union officials, and the fact that one UNITE representative, who was involved in organizing Respondent's employees, is not associated with Workers United is far from sufficient to establish that this organizational change was so dramatic that Workers United lacked substantial continuity with UNITE. *Kravis v. NLRB*, supra, 550 F.3d at 1190; *Sullivan Bros. Printers*, supra, 317 NLRB at 562.

Respondent's reliance on the campaign literature issued by UNITE is also misplaced, and is also far from sufficient to meet Respondent's burden of establishing changes sufficiently dramatic to alter the identity of UNITE and, thus, the substitution of an entirely different union as the representative of Respondent's employees. *CPS Chemical*, supra, 324 NLRB at 1020.

As I have set forth above, Respondent argues essentially that since UNITE at the time of the organizing of Respondent's employees through DSAW represented MRDD facilities and that it emphasized that fact in its campaign literature, Workers United is a substantially different labor organization from UNITE because it did not represent any MRDD facilities and did not employ anyone with experience in representing MRDD employees. I do not find that the absence of any Workers United officials with experience in representing MRDD shops, or, indeed, any evidence that any entity affiliated with Workers United represented MRDD facilities is sufficient in itself to establish a "substitution of an entirely different union as employees' representative." *CPS Chemical*, supra, 324 NLRB at 1020.

Significantly, in this regard, Workers United has become affiliated with the SEIU. When Workers United and UNITE HERE settled their dispute over the disaffiliation of UNITE HERE, UNITE HERE agreed that SEIU shall have exclusive jurisdiction for organizing MRDD workers. Indeed, it was a result of this agreement that UNITE HERE disclaimed interest in, representing Respondent's employees. This agreement supports the conclusion that I draw that in fact, the SEIU did have substantial experience in organizing and representing MRDD employees.

This conclusion is fortified by several Board and administrative law judges' decisions. *Green Valley Manor*, 353 NLRB 905, 909 (2009) (Local 2000 of SEIU organized nursing home that employed employees caring for residents with physical and mental disabilities); *NHS Human Services Inc. of Allegheny & Westmoreland*, JD-28-11 (May 12, 2011) (Local 668 of the SEIU represented employer engaged in operation of human service organization providing community-based mental health and intellectual developmental disability services to adults and children in Pennsylvania); *Voca Corp. of West Virginia*, JD-60-02 (August 9, 2002) (District 1199, SEIU represented employees of employer for 10 years that provided residential care services to mentally retarded individuals at several facilities in West Virginia).

Further, an examination of the United States Department of Labor website reveals that several SEIU locals have current collective bargaining agreements with entities that employ MRDD employees.³⁸

5 Additionally, an examination of various SEIU websites reveals further evidence of the SEIU's representation of MRDD workers as well as SEIU locals lobbying for additional funds for the industry. For example, www.seiu.org details that in June 2011, Local 503 was certified by the State Employment Relations Board in Oregon to represent 7500 workers, who provide support for adults and developmental disabilities. Also, www.huntingtonnews.net reports on an SEIU news release that Becky Williams was elected on August 19, 2008 as president of SEIU, District 1199, which has 35,000 members and represents employees in various health care industries, including MRDD facilities in West Virginia, Kentucky and Ohio. A job's advertisement appearing in www.seiu.org for a field organizer position with SEIU, District 1199 WKO (West Virginia, Kentucky and Ohio) also reflects that SEIU, District 1199 represents employees at MRDD facilities. The SEIU, District 1199 website also contained an arbitration award involving the union and the State of Ohio concerning MRDD workers represented by District 1199 at several developmental centers (2004 NAC 149).

20 Additionally, SEIU, Local 721 reports on its website³⁹ that this local, located in California, engaged in lobbying with the mental health committee to bring new funds into the mental health system by helping to pass the Mental Health Service Act-Proposition 63 and is now lobbying to reject Proposition 1E, which would strip funds from the Act's revenues.

25 Local 200, SEIU on its website⁴⁰ reports that it is a local that represents employees employed at human services agencies throughout New York State in the MRDD mental health and foster care industries. It also lists five offices located in various cities in New York State and names several human services agencies, where it represents employees. An examination of the websites for these employers confirms that they service MRDD clients.⁴¹

30 I note in this connection that the Board has frequently relied on websites to make findings and conclusions. *J. Picini Flooring*, 356 NLRB #9 (Oct. 22, 2010) slip op p. 3 fn. 7 (Board relies on surveys reported in cited websites, demonstrating that large percentages of employers used electronic distribution to communicate with its employees); *Carpenters Local 1506 (Eliason & Knuth of Arizona, Inc.)*, 355 NLRB #159 (August 27, 2010) slip op p. 11 fn. 33 (Board cites several websites in support of its assertion that banners are common forms of public expression); *Cibao Meat Products*, 348 NLRB 47, 55 (2006) (reliance on website to establish that discriminatee in backpay hearing would get 17 miles per gallon driving his vehicle).

40 Accordingly, based on the foregoing, I conclude that various SEIU locals have experience in representing MRDD employees, have contracts with employers in the MRDD industry and engage in lobbying with respect to MRDD issues. Therefore, since Workers United

45 ³⁸ Contracts between State of California and Local 1000 SEIU and between Local 1199 SEIU and the State of Connecticut.

³⁹ www.seiu721.org

⁴⁰ www.seiu200united.org

50 ⁴¹ Cayuga Home for Children, www.cayugahome.org; CWI (Community Work & Independence), www.cwinc.org; Vanderheyden Hall, www.vanderheydenhall.org; Berkshire Farm Center and Services for Youth, www.berkshirefarm.org; New Horizons Resources, www.nhrny.org; Dutchess ARC, <http://dutchess-arc.org>.

is now affiliated with the SEIU, the above finding minimizes the significance of Respondent's reliance on the absence of any evidence that any Workers United officials or entities had experience in representing MRDD employees and facilities. Thus, Respondent's argument that Workers United is a substantially different organization than UNITE has even less cogency due to Workers United's affiliation with the SEIU.⁴²

Accordingly, based upon the foregoing analysis and authorities, I conclude that Respondent has fallen far short of meeting its burden of proof of a lack of continuity between UNITE and Workers United.

B. The Alleged Refusal to Bargain

Having found that Respondent has not met its burden of proving discontinuity, there can be little question that it has violated the Act by refusing to recognize and bargain with Workers United and by failing to supply admittedly relevant information to Workers United.⁴³

Respondent argues, however, that where a company's workforce has changed substantially since the election, there is no way of knowing if, as in this case, the union enjoys the majority support. Therefore, equity weighs against issuing a bargaining order. *NLRB v. Connecticut Foundry Co.*, 688 F.2d 871, 881 (2nd Cir. 1982); *NLRB v. Nixon Gear, Inc.*, 649 F.2d 906, 914 (2nd Cir. 1981); *National Posters, Inc. v. NLRB*, 885 F.2d 175, 180 (4th Cir. 1989).

In this regard, Respondent notes that since the election, Respondent has added several new facilities and a substantial increase in the number of eligible voters. Respondent also asserts that 87% of the current employees in the unit did not have the opportunity to vote and to elect any representative. Therefore, it argues that because of this dramatic change in Respondent's workforce, equity requires that a bargaining order not be issued.

Once more, I cannot agree with Respondent's contention. It is true that since the election, Respondent has added three new facilities and four new day programs. However, General Counsel had not sought to expand the certification to include the new facilities, so these changes are irrelevant to the propriety of a bargaining order.⁴⁴

Respondent's assertion in its brief that "87% of the current employees in the proposed bargaining unit did not have the opportunity to elect any representative" is not supported by any record evidence. Respondent adduced no evidence of turnover and no other evidence of how many employees, who voted in the election, are still employed. However, even if that assertion was substantiated, it would not be a valid defense to the imposition of a bargaining order.

It is clear that neither expansion of the unit nor extensive employee turnover warrants denial of a bargaining order, where there has been a certification. This is because, absent unusual circumstances, which do not include turnover or unit expansion, a union's majority

⁴² As I have related above, I have concluded that even absent Workers United's affiliation with the SEIU that Respondent has failed to prove that Workers United was an "entirely different" labor organization than UNITE. *CPS Chemical*, supra. My findings with respect to Workers United's affiliation with the SEIU serves only to reinforce that conclusion.

⁴³ Respondent concedes that the information requested by Workers United is relevant to the Union's representational responsibilities.

⁴⁴ The evidence submitted indicates that 54 employees are included in the new day programs and the new facilities.

status is irrebuttably presumed to exist⁴⁵ throughout the one-year period following the union's certification. The one-year period does not begin until the date the employer begins to bargain with the union. *Action Automotive Inc.*, 284 NLRB 251 fn. 1 (1987).

5 These principles are applicable even where, as here, there has been an extensive delay since the election or the certification. *Long Island College Hospital*, 310 NLRB 689, 698 (1993) (13-year delay from election, plus turnover, does not warrant denial of bargaining order).

10 The cases cited by Respondent in support of its assertion are clearly distinguishable and are in part supportive of the issuance of a bargaining order here. *NLRB v. Connecticut Foundry*, supra and *NLRB v. Nixon Gear*, supra are clearly inapposite since they both do not deal specifically with whether a bargaining order is appropriate. Rather, both cases involve situations where the Court refused to enforce Board orders because the Board had erroneously, in the Court's view, failed to permit the employers the opportunity to have a hearing on their objections to the election. The Court, then, in deciding whether to remand to the Board for a hearing, applied equity principles. In so doing, the opinions did rely in part on the assertion, cited by Respondent here, that "the labor force at the Company has undoubtedly changed since the election, and there is no way of knowing at this time if the Union enjoys a majority of support." *Nixon Gear*, supra, 649 F.2d at 914, quoted in *Connecticut Foundry*, supra, 688 F.2d at 881. However, these statements by the Courts are only part of their reasons for not remanding the cases to the Board.⁴⁶ The primary equitable consideration for the Courts' decisions was the fact that the Board has erroneously declined to afford the employers the right to hearings on their objections. The Courts relied on the assertions by the employers that the delay caused by the Board in not affording them hearings had decreased the possibility of the employers' prevailing at a hearing because witnesses' memories fade and some key witnesses may be unavailable. *Nixon Gear*, supra, 649 F.2d at 906; *Connecticut Foundry*, supra, 688 F.2d at 881 (Court finds that "the NLRB's failure to order hearings on the issues we have specified renders the Company's burden on those issues much more difficult if not insurmountable.") Id. Further, both cases also relied in part on the closeness of the elections.

30 *National Posters*, supra, the third case cited by Respondent, while citing *Connecticut Foundry* and other cases that refused to enforce bargaining orders based on traditional equity principles, did not in fact apply those principles. To the contrary, the Fourth Circuit Court opinion expressly declined to conclude as the employer there had argued that the employee turnover and delay entitled it to a hearing to present evidence of turnover. Rather, the Court applied longstanding precedent, cited above, that turnover does not raise a question concerning representation and that replacement employees are presumed to support the unit in the same ratio as those replaced. 885 F.2d at 181, citing *Universal Security Instruments, Inc. v. NLRB*, 649 F.2d 247, 255 (4th Cir. 1981); *NLRB v. 1199, National Union of Hospital and Health Care Employees*, 829 F.2d 318, 323 (4th Cir. 1987). The Court, therefore, denied the employer's request for a hearing to present evidence of turnover and enforced the Board's request for a bargaining order. 885 F.2d at 181.

45 This is because replacement employees are presumed to support the union in the same ratio as those replaced. *National Posters v. NLRB*, supra, 885 F.2d at 181.

46 I would also note that these factors cited by the Court are contrary to longstanding Board precedent supported by the federal courts, including the Supreme Court, as detailed above, that a union enjoys an irrebuttable presumption of majority status for one year following a certification. *Brooks v. NLRB*, 348 U.S. 96, 164; 75 S. Ct. 176, 181-182 (1954); *NLRB v. Star Color Plate Service*, 843 F.2d 1507, 1509 (2nd Cir. 1988).

Further, *Connecticut Foundry* and *Nixon Gear* have both been distinguished on this basis by both the Board⁴⁷ and the Second Circuit itself. *NLRB v. Star Color Plate Service*, supra, 843 F.2d at 1509-1510. These cases reaffirm the longstanding Board and Court precedent that turnover and delay do not justify denial of a bargaining order, where there has been a certification and the one-year period has not expired. The exceptional circumstances found in *Connecticut Foundry* and *Nixon Gear*, which motivated the Courts there to deny bargaining orders in part due to turnover and delay, are not present here.

Respondent has not been denied a hearing in this case. It was granted and had a hearing in 2003 to litigate its assertion that the New York labor law impacted on the election and in 2011, in order to litigate its further assertions concerning the continuity of the certified labor organization. Further, unlike the cases cited by Respondent, the election here was not close.⁴⁸

Accordingly, I conclude that Respondent's contention that equitable principles, i.e. delay,⁴⁹ turnover and unit expansion, require denial of a bargaining order is without merit.

I, therefore, conclude that Respondent has violated Section 8(a)(1) and (5) of the Act by refusing to recognize and bargain with Workers United and refusing to supply relevant information to the Union.

Conclusions of Law

1. The Respondent, Independence Residences, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act and has been a healthcare institution within the meaning of Section 2(14) of the Act.

2. Workers United Service Employees International Union (Workers United) is a labor organization within the meaning of Section 2(5) of the Act,

3. At all material times, herein, Workers United has been the successor to UNITE, AFL-CIO, CLC (UNITE) and has been the exclusive collective bargaining representative of the following appropriate collective bargaining unit:

All full-time and regular part-time Relief employees in the classifications of Direct Care Workers, Residential Habilitation Specialists, Day Habilitation Workers, Medical Care Workers and Maintenance, employed by the Employer at and out of its office located at 93-22 Jamaica Avenue, Woodhaven, New York and the

⁴⁷ *Long Island College Hospital*, supra, 310 NLRB 689 fn. 2.

⁴⁸ 68 votes were cast for the Union and 32 against it.

⁴⁹ I am cognizant of Chairman Liebman's own observation in her concurring opinion in *Independence Residence*, supra, 355 NLRB at 17, that the case has languished at the Board for "over seven years – an unconscionably long time." However, in fairness to the Board, I do note that there is some justification for the delay. The issue of whether the New York labor law was preempted was a central issue to the case. A similar California law was being considered by the federal courts, and ultimately, the Supreme Court in *Brown*, supra found that law preempted in 2008. However, the New York law, which is similar to, but not identical with the California law, was also subject to litigation in federal court, and is still pending in district court. Further, for a substantial period of time during the 6 years that the Board was considering the case, it had only two members.

following 11 facilities: Park Lane South Residence in Richmond Hill, Florence Kalil Gutman Residence in Sunnyside, Metropolitan Towers Residence I in Kew Gardens, Metropolitan Residence II in Kew Gardens, Judita M. Prelog Residence in South Ozone Park, Jackson Heights Residence in Woodside, Dr. Betty Bird Residence in Woodhaven, Forest Hills Residence in Forest Hills, 101st Avenue Residence in Ozone Park, 77th Street Residence in Woodhaven and East 21st Street Residence in Brooklyn, excluding all office clerical and administrative employees, technical employees, professional and managerial employees, guards and supervisors as defined in Section 2(11) of the Act.

4. The Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act by refusing to recognize and bargain with Workers United as the exclusive representative of the employees in the unit described and by refusing to supply relevant information to the Union.

5. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be order to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act.

I shall recommend that the Respondent be ordered to bargain collectively with Workers United as the exclusive collective bargaining representative of the employees in the certified appropriate collective bargaining unit, set forth above. Inasmuch as Workers United has not yet enjoyed its certification year, I shall recommend that the initial certification year be extended as it had not expired. *Deposit Telephone*, supra, 349 NLRB at 226; *Long Island College Hospital*, supra, 310 NLRB at 699.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵⁰

ORDER

The Respondent, Independence Residences, Inc., Woodhaven, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a). Failing and refusing to recognize and, on request, bargaining collectively with Workers United Services Employees International Union as the exclusive collective bargaining representative of its employees in the following

⁵⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

certified, appropriate collective bargaining unit:

All full-time and regular part-time Relief employees in the classifications of Direct Care Workers, Residential Habilitation Specialists, Day Habilitation Workers, Medical Care Workers and Maintenance, employed by the Employer at and out of its office located at 93-22 Jamaica Avenue, Woodhaven, New York and the following 11 facilities: Park Lane South Residence in Richmond Hill, Florence Kalil Gutman Residence in Sunnyside, Metropolitan Towers Residence I in Kew Gardens, Metropolitan Residence II in Kew Gardens, Judita M. Prelog Residence in South Ozone Park, Jackson Heights Residence in Woodside, Dr. Betty Bird Residence in Woodhaven, Forest Hills Residence in Forest Hills, 101st Avenue Residence in Ozone Park, 77th Street Residence in Woodhaven and East 21st Street Residence in Brooklyn, excluding all office clerical and administrative employees, technical employees, professional and managerial employees, guards and supervisors as defined in Section 2(11) of the Act.

(b). Refusing to provide information requested by Workers United, which is necessary and relevant to Workers United's performance of its duty as the exclusive representative of its employees in the unit described above.

(c). In any like to related manner interfering with, restraining or coercing its employees in the exercise of the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a). Recognize and, on request, bargain in good faith with the Union as the exclusive collective bargaining representative of its employees in the certified unit found appropriate respecting rates of pay, hours of work, or other terms and conditions of employment and, if an understanding is reached, embody it in a written and signed agreement. The Union's certification year shall extend one year from the date that such good faith bargaining begins.

(b). We will promptly furnish to Workers United all bargaining information that was requested on November 30, 2010.

(c). Within 14 days after service by the Region, post at its Woodhaven, New York facility and at all of its other locations and facilities in Brooklyn and Queens, which comprise the appropriate unit described above, copies of the attached notice marked "Appendix."⁵¹ Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper

⁵¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

5 notices, notices shall be distributed electronically, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 30, 2010.

10 (d). Notify the Regional Director for Region 29 in writing within 21 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C., August 24, 2011.

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Steven Fish,
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

WE WILL NOT fail or refuse to recognize and, on request, bargain collectively with Workers United Service Employees International Union as the exclusive collective bargaining representative of our employees in the following certified, appropriate collective bargaining unit:

All full-time and regular part-time Relief employees in the classifications of Direct Care Workers, Residential Habilitation Specialists, Day Habilitation Workers, Medical Care Workers and Maintenance, employed by the Employer at and out of its office located at 93-22 Jamaica Avenue, Woodhaven, New York and the following 11 facilities: Park Lane South Residence in Richmond Hill, Florence Kalil Gutman Residence in Sunnyside, Metropolitan Towers Residence I in Kew Gardens, Metropolitan Residence II in Kew Gardens, Judita M. Prelog Residence in South Ozone Park, Jackson Heights Residence in Woodside, Dr. Betty Bird Residence in Woodhaven, Forest Hills Residence in Forest Hills, 101st Avenue Residence in Ozone Park, 77th Street Residence in Woodhaven and East 21st Street Residence in Brooklyn, excluding all office clerical and administrative employees, technical employees, professional and managerial employees, guards and supervisors as defined in Section 2(11) of the Act.

WE WILL NOT refuse to provide information requested by Workers United, which is necessary and relevant to Workers United's performance of its duty as the exclusive bargaining representative of our employees in the unit described above.

WE WILL NOT in any like to related manner interfere with, restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, on request, bargain in good faith with Workers United as the exclusive collective bargaining representative of our employees in the certified unit found appropriate respecting rates of pay, hours of work, or other terms and conditions of employment and, if an understanding is reached, embody it in a written and signed agreement.

WE WILL promptly furnish to Workers United all bargaining information that was requested on November 30, 2010.

Independence Residences, Inc.

(Employer)

Dated _____

By _____

(Representative)

(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

Two MetroTech Center, Jay Street and Myrtle Avenue, Suite 5100
Brooklyn, New York 11201-4201
Hours: 9 a.m. to 5:30 p.m.
718-330-7713

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 718-330-2862.